

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-2104

To be argued by
JERRY L. SIEGEL

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-2104

BILL LAM, a k a LAM MAN CHUNG,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Bill Lam, a/k/a Lam Man Chung, appeals from an order entered on July 9, 1976, in the United States District Court for the Southern District of New York by the Honorable Henry F. Werker, United States District Judge, denying Lam's motion, pursuant to Title 28, United States Code, Section 2255, to vacate his judgment of conviction and sentence.

Indictment 73 Cr. 443, containing ten counts, was filed on May 11, 1973.* Count One charged Lam and five other defendants with conspiring to distribute heroin in violation of Title 21, United States Code, Section 846. Counts Two, Three, Six and Seven charged Lam and others with distributing, and possessing with intent to

* Indictment 73 Cr. 443 superseded Indictment 73 Cr. 47.

distribute, heroin in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2. The remaining counts, in which Lam was not named, charged various of his co-defendants with distribution of narcotics and use of a weapon during the commission of a felony, the latter charge being a violation of Title 18, United States Code, Section 924(c).

On May 31, 1973, Lam pleaded guilty before the Honorable Murray I. Gurfein, then a United States District Judge, to Count Seven of the indictment, in which he alone was charged with possession of heroin with intent to distribute. On July 26, 1973, Judge Gurfein sentenced Lam to a ten-year term of imprisonment and a term of special parole of three years.

On July 11, 1973, after the entry of Lam's guilty plea before Judge Gurfein but before the imposition of sentence, Lam was arrested while he was in possession of one pound of heroin. Following a trial before the Honorable Morris E. Lasker and a jury, Lam was convicted of possession of heroin with intent to distribute. On December 21, 1973, Judge Lasker sentenced Lam to a five-year term of imprisonment to be served consecutively to the ten-year prison term imposed by Judge Gurfein.

In a series of petitions filed between December 8, 1975 and January 29, 1976, Lam moved to vacate the conviction for which he was sentenced by Judge Gurfein, as well as the one before Judge Lasker. With respect to issues raised in connection with the guilty plea before Judge Gurfein, in a Memorandum Opinion filed on April 6, 1976, Judge Gurfein denied without a hearing all of Lam's claims save one, as to which he directed that a hearing be held.

On June 22, 1976, a hearing was conducted before Judge Werker, following which, in an opinion filed on July 9, 1976, Judge Werker denied petitioner's motion.

Statement of Facts

A. Lam's Arrests and Pleas

Petitioner Lam was arrested in a Chinese gambling house on December 18, 1972, and charged with violating the federal narcotics laws. He and his family thereupon retained Gustave Gerber to represent him, Gerber having successfully defended Lam in two other criminal cases during the previous two years.* Lam thereafter arranged for Gerber to represent Szeto To Suey Nom ("Szeto"), a co-defendant who was arrested with Lam. (Tr. 32, 65-66; A. 8).**

On January 15, 1973, Indictment 73 Cr. 47 was filed, charging Lam, Szeto and others with violations of the federal narcotics laws. On January 29, 1973, both Lam and Szeto, represented by Gerber, entered pleas of not guilty. Thereafter, on May 11, 1973, superseding Indict-

* In 1970 Gerber defended Lam against state charges that he shot another individual and succeeded in having the case dismissed. (Tr. 28-29, 63).

In July of 1972, Lam was also indicted for federal narcotics violations in *United States v. Lam, et al.*, 72 Cr. 886. After Mr. Gerber successfully moved before Judge Weinfeld to suppress certain evidence, these charges were also dismissed. (Tr. 30-31, 64; A. 8).

** "Tr." refers to the June 22, 1976, hearing transcript; "P. Tr." refers to the May 31, 1973 plea transcript; "S. Tr." refers to the July 26, 1973 sentence transcript; "Br." refers to the appellant's brief; "A." refers to the Appendix to appellant's brief which contains the April 6, 1976, opinion of Judge Gurfein and the July 9, 1976, opinion of Judge Werker.

ment 73 Cr. 443 was filed as previously described.* On May 14, 1973, Lam and Szeto appeared before Judge Gurfein with Mr. Gerber and entered pleas of not guilty to this superseding indictment.**

During the period between their arrest and the entry of their guilty pleas on May 31, 1973, Lam and Szeto met individually and jointly with Gerber on numerous occasions to discuss their cases. (Tr. 9, 37, 66-68; A. 8). Lam initially denied to Gerber any involvement with narcotics, either as a distributor or a user, while Szeto admitted to possession of narcotics but claimed the heroin was for his personal use only. (Tr. 69-70, 72).

In early or mid-May, 1973, Lam admitted to Gerber that the heroin found on the floor of the Chinese gambling house in which he was arrested was in fact his and that the safe in the gambling house was used to store narcotics for distribution. (Tr. 73-74). Lam decided to plead guilty and appeared in court with Szeto on May 31, 1976, the date set down for trial, prepared to enter a guilty plea. (Tr. 87-89).

On the morning of May 31, 1973, however, Lam changed his mind and decided to go to trial alone and Mr. Gerber so informed the court. (P. Tr. 4-5). Szeto initially persisted in his desire to plead guilty to Counts Three and Eight of the indictment but in the course of Judge Gurfein's inquiry pursuant to Rule 11 of the Federal Rules of Criminal Procedure, Szeto denied any intent to distribute the heroin. Judge Gurfein declined to accept the proffered plea and called for the jury panel (Tr. 79, P.Tr. 11-14).

* Lam was named in Counts One, Two, Three, Six and Seven of that indictment, while Seto was named in Counts One, Two, Three, Six and Eight.

** Appellant makes much of the failure of Judge Gurfein on May 14, 1973 to inform Lam and Szeto of their right to separate counsel and to inquire as to a possible conflict in their joint representation. The more important question of what inquiry was conducted by the court at the time Lam and Szeto initially entered their pleas on January 29, 1973, is unfortunately not answerable on this record.

A jury was empanelled and sworn and the Assistant United States Attorney made an opening statement to the jury in which he outlined the evidence the Government would offer against the defendants, including the testimony of Joseph Lee, an accomplice who pled guilty prior to trial, and several officers of the New York Drug Enforcement Task Force, who, upon entering the gambling house with a search warrant, saw Lam throw the heroin to the floor. (P.Tr. Supp. 1-8; Tr. 48-49).

After hearing this outline of the Government's case and reviewing the 3500 material with Gerber over lunch, Lam again decided to plead guilty. (Tr. 79-81). Lam then pleaded guilty to Count Seven of the Indictment, (P.Tr. 21-29) while Szeto pleaded guilty to Counts Three and Eight. (P.Tr. 36-39). In the course of his Rule 11 allocution, Lam stated as follows:

The Court: Are you satisfied with Mr. Gerber as a lawyer?

Lam: Yes.

The Court: Have you read the indictment?

Lam: Yes.

The Court: Has Mr. Gerber explained to you the nature of the charge against you?

Lam: Yes.

The Court: Has he explained it to your satisfaction?

Lam: Yes.

(P.Tr. 25).

* * * * *

The Court: Have any promises been made to you to induce you to plead guilty?

Lam: No.

The Court: Have any promises been made by the United States Attorney, or by your own lawyer,

Mr. Gerber, or by the Court?

Lam: No.

The Court: Have any threats been made against you or any member of your family to induce you to plead guilty?

(P.Tr. 26-27).

Lam: No.

* * * * *

The Court: Are you pleading guilty freely and voluntarily only because you are guilty and for no other reason?

Lam: Yes.

(P.Tr. 27). On the basis of these and other statements, Judge Gurfein accepted the plea of guilty. (P.Tr. 22-29).

Following the entry of his guilty plea on May 31, 1973, Lam was enrolled in a narcotics treatment program at Odyssey House in the hope that the court might sentence him to participation in the program rather than imprisonment. (Tr. 75-77, 82). Unable to withstand the rigors of the program, Lam left and within three days of his departure, on July 11, 1973, he was arrested with one pound of heroin in his possession. (Tr. 33, 41, 82-83). Mr. Gerber represented Lam the following day at his arraignment on those charges.

On July 26, 1973, Lam was sentenced by Judge Gurfein on indictment 73 Cr. 443 to a ten-year term of imprisonment to be followed by a special parole term of three years.* (S. Tr. 9).

* At the time of sentencing, Judge Gurfein stated:

"I consider the defendant the prime mover in the conspiracy involving this group in Chinatown. He was in constant possession of drugs, the use of drugs, brought others into it. . . ." (S. Tr. 9).

Following his trial and conviction before the Honorable Morris Lasker and a jury on indictment 73 Cr. 920, stemming from his July 11, 1973 arrest, Lam was sentenced on December 21, 1973, by Judge Lasker to a five-year term of imprisonment and six year special parole term, to be served consecutively to the sentence imposed by Judge Gurfein.*

B. Lam's Motions And The Hearing Before Judge Werker

Beginning in October of 1975, more than two years after his guilty plea before Judge Gurfein, Lam began filing a series of motions aimed at setting aside his conviction and sentence on a variety of grounds. In a Memorandum Opinion filed on April 6, 1976, Judge Gurfein denied all the claims except the allegations concerning joint representation, for which he directed that a hearing be held.**

* Lam also moved, in 76 Civ. 1059, to vacate the sentence imposed by Judge Lasker on the ground that the court there imposed a six-year special parole term without addressing him personally. On September 30, 1976, Judge Lasker in fact vacated the sentence. On November 12, 1976, he resentenced petitioner to the same five-year term of imprisonment to run consecutive to the ten-year term imposed by Judge Gurfein which he had imposed originally, and a special parole term of three rather than six years.

** Treating these petitions as motions under Title 28, United States Code, Section 2255, Judge Gurfein (1) denied as being of "no merit" Lam's claim that the factual basis for the plea was inadequate; (2) rejected as "frivolous" the claim that the court had failed to advise Lam of the three-year special parole term requirement; and (3) rejected Lam's claim that the ten-year sentence was invalid because the Parole Board had scheduled his second hearing at a time when he would have served one-third of his combined consecutive sentence.

With respect to the claim underlying the instant appeal, Judge Gurfein said "I am not certain that the records and files

[Footnote continued on following page]

On June 22, 1976, an evidentiary hearing was conducted before Judge Werker at which Lam and Mr. Gerber testified.

Lam testified that while he did in fact retain Gerber following his arrest on December 18, 1972, and thereafter arranged for Szeto to be represented by him as well, at no time did Gerber explain to him that (1) he and Szeto had a right to separate counsel, or (2) that there might be a conflict of interest in their being jointly represented by him. (Tr. 8-9). Lam claimed that although Gerber advised Szeto to plead guilty since the Government had a solid case against him, Lam insisted he wanted to go to trial since he "never had actually deal[t] narcotic[s] with the informer" and since "they did not find anything with me while I was arrested." (Tr. 14).

Lam then claimed that Gerber told him to plead guilty because if he went to trial, all the testimony concerning Szeto's activities would be elicited "and the judge will have the impression that Szeto is [a] more dangerous user," and would give him a greater sentence. (Tr. 16-17, 19-23). This representation, Lam testified, was the most important reason in his decision to plead guilty rather than go to trial. (Tr. 54). Other factors that Lam mentioned as inducing him to plead guilty included (1) his hope that if he pleaded guilty, he would be sentenced to a narcotics treatment program rather than jail,* and

before me 'conclusively' show that petitioner is unentitled to relief," and accordingly, "As a matter of discretion I will order a hearing on the theory that there may be factual issues which cannot be determined by affidavit." (A. 5-6) Judge Gurfein simply did *not*, as Lam states, direct that a hearing be held "because the District Court had accepted petitioner's guilty plea without inquiring into the possible conflict of interest." (Br. 2).

*Lam acknowledged and the court found that Gerber had told him only that he would ask the court that he be thus sentenced and in no way promised him that he would be. (Tr. 40; A. 9).

(2) his belief that it would be futile to go to trial. (Tr. 22-23).

On cross-examination, Lam first claimed that he had never pleaded guilty to a crime, but then acknowledged that he had in fact pleaded guilty in three prior criminal cases.* (Tr. 25-28). Lam also acknowledged that in the two other criminal cases in which Gerber represented him, Gerber never advised him to plead guilty and had in fact succeeded in having both cases dismissed.** (Tr. 28-31). Lam insisted that although he and Szeto did not conspire to or distribute narcotics as charged in the indictment; he claimed he had pleaded guilty and risked the possibility of a substantial term of imprisonment in order to prevent Szeto from receiving a greater sentence.*** (Tr. 44-46).

The Government then called Gustave Gerber, Lam's prior attorney, as a witness. Gerber explained how he

* Lam explained that on two of these occasions he simply did not understand the proceedings since he didn't have an interpreter. (Tr. 25-28).

** In fact, much of Lam's present dissatisfaction with Mr. Gerber's representation of him may well stem from the sentence which Judge Gurfein saw fit to impose in this case and little else. In three prior criminal cases, Lam entered pleas of guilty to reduced charges and as a result, received very brief jail sentences. (Tr. 26-28). As noted, on the two other occasions on which Gerber previously represented Lam, he succeeded in having both cases dismissed. (Tr. 28-31, 63-64).

Even after his entry of the guilty plea on May 31, 1973, Gerber was retained to represent Lam following his arrest on July 11, 1973. It was only after he received the sentence of ten years imprisonment from Judge Gurfein that Lam replaced Gerber with another attorney (Tr. 33-34).

*** Lam was unable to obtain Szeto's presence at the hearing and requested an adjournment to secure his attendance. The Government, however, stipulated for purposes of the hearing that if called Szeto's testimony "would not differ in any respect" from Lam's testimony. (Tr. 59).

had come to represent Lam and Szeto and explained in detail his meetings with the defendants, individually and jointly, in preparation for this case. (Tr. 65-67). Gerber stated that he did not discuss with the defendants themselves whether there was a conflict in their positions (Tr. 69), but that after thoroughly exploring matters with the two, he concluded there was in fact no conflict in their cases that would prevent him from jointly representing them. (Tr. 68-69). Gerber noted that both defendants denied participation in the conspiracy. Moreover, Szeto, an addict who was arrested with narcotics in his possession, claimed they were for his personal use only, while Lam, who was not arrested with narcotics in his possession, initially denied to Gerber any connection at all with the narcotics found at the gambling house. (Tr. 69-74, 86-87).

Gerber pointed out that even in having the defendants plead guilty, he was careful to insure that they pleaded to different counts. Thus, Lam pleaded guilty to Count Seven, which charged him alone with possession of narcotics, while Szeto pleaded to Counts Three and Eight. (Tr. 70).

Gerber then went on to explain the sequence of events following his entering the case, including Lam's initial decision to plead guilty in mid-May, (Tr. 72-75, 88), their discussions concerning the possibility of Lam's being committed to Odyssey House, (Tr. 75-77) and the events of May 31, 1976. These events included the initial plea effort by Szeto, (Tr. 78-79) the Government's opening statement to the jury, (Tr. 79-80) his review of the 3500 material and discussions with the defendants during the luncheon recess, (Tr. 80-81) and their guilty pleas that afternoon. (Tr. 81-82).

Gerber explicitly denied ever telling Lam that if he went to trial and was convicted, Szeto would receive a

greater sentence, or in any way advising him to plead guilty for such a reason. (Tr. 81-85). As Mr. Gerber put it, "I never recommended to one to plead guilty in order to help the other. They were two separate situations in my contemplation." (Tr. 85). Although the Government had been willing to accept a guilty plea from Szeto and to try Lam by himself (P.Tr. 4-5), Gerber testified that it was his experience and understanding generally that in multiple defendant cases the Government was unlikely to agree to accept a plea from only one defendant. (Tr. 90-92).

C. Judge Werker's Opinion

In an opinion and order filed July 9, 1976, Judge Werker rejected Lam's claim and denied his motion.

With respect to the claimed conflict, the court found that Mr. Gerber never advised Lam to plead guilty so that Szeto would benefit thereby, thus flatly rejecting petitioner's testimony to the contrary. (A. 10). Noting that in light of his extensive criminal record, Lam was "no stranger to the criminal justice system prior to his plea to this indictment," and was "not unaware of his right to the effective assistance of counsel," the court found it "incredible that this defendant would have been willing to risk a possible sentence of fifteen years, three years of special parole and a \$25,000 fine merely to prevent his co-defendant from getting a stiffer sentence." (A. 9). The Court found that:

"The more logical explanation for both pleas was the fact that the Assistant United States Attorney had made his opening remarks before the lunch recess, that 18 U.S.C. § 3500 material was furnished to defendants' counsel before lunch and that

counsel during lunch made defendants aware of what the government witnesses would testify to and how strong the government's case actually was." (A. 9-10).

The Court found further that Mr. Gerber had provided competent legal advice, meeting with Lam and Szeto, individually and jointly, on many occasions, and conducting a careful investigation into the case. (A. 8). The Court noted that while Gerber did not discuss with the defendants the possible conflict or the right to independent counsel, Gerber concluded as a result of this careful investigation that there was no conflict, and advised petitioner to plead guilty only after he was himself convinced of his client's guilt. (A. 8, 10).

With respect to Mr. Gerber's understanding that in multiple defendant cases the Government was unlikely to agree to accept a plea from just one defendant, the Court found that this in itself created no conflict. In fact, the Court found Gerber's understanding to be "probative of the fact that he would not have caused petitioner to plead guilty," since, as the Court observed, "the most logical inference from the fact that Szeto had failed to plead guilty and Mr. Gerber's belief as to the practice of the United States Attorney would be that Mr. Gerber would have no motivation to induce a plea from Mr. Lam since he believed that it would not have been agreed to anyway." (A. 9, 11).

In conclusion, the Court found that while it would have been more prudent for the District Court pursuant to *United States v. De Berry*, 487 F.2d 448 (2d Cir. 1973), to have inquired as to the possibility of a conflict of interest prior to accepting the guilty pleas, there was

"no merit to the contention that a conflict of interest did exist in the representation of both defendants by Mr. Gerber at the time the pleas were taken or that the petitioner was denied the effective assistance of counsel." (A. 10).

ARGUMENT

There Was No Conflict of Interest in Counsel's Representation of Petitioner and his Co-Defendant Upon Their Pleas of Guilty, Nor Was Lam Denied Effective Assistance of Counsel.

Abandoning the ground upon which he originally sought to vacate his guilty plea,* Lam now claims that his attorney's belief that the United States Attorney was unlikely to accept a guilty plea from only one defendant in a multi-defendant case resulted in a conflict of interest that denied him effective assistance of counsel at his guilty plea. Aside from the fact that this claim is based upon a very fundamental misreading of the record in this case, it is clearly untenable in light of the District Court's findings of fact to the contrary.

* Judge Gurfein granted a hearing, and Judge Werker conducted same on June 22, 1976, in order to resolve Lam's claim that his plea and sentence must be vacated because "Lam was pleading guilty because his counsel advised him that a co-defendant, Szeto to Suey Nom ("Szeto"), whom the same counsel also represented, would get a harsher sentence if petitioner went to trial." (Pre-Hearing Memorandum in Support of Petitioner's Motion at 1-2). The frivolousness of that claim having been made abundantly clear at the June 22 hearing, Lam now shifts ground, claiming that it was his attorney's belief with respect to the plea policy of the United States Attorney that tainted his plea and requires that it be vacated. (Br. 13-16).

In *Glasser v. United States*, 315 U.S. 60 (1942), the Supreme Court included within the basic Sixth Amendment right to counsel in criminal cases the right to representation free from conflicting interests. It is clear, however, that although not a favored practice, "the mere representation of two or more defendants by a single attorney does not automatically give rise to a constitutional deprivation of counsel." *United States v. Carrigan*, Dkt. No. 74-2056, slip op. 226 (2d Cir., Nov. 3, 1976). Rather,

"It is settled in this Circuit that 'some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel.' "

United States v. Mari, 526 F.2d 117, 119 (2d Cir. 1975), quoting *United States v. Lovano*, 420 F.2d 769 773 (2d Cir.), cert. denied, 397 U.S. 1071 (1970).

His original allegations concerning his plea having been found to be baseless, petitioner now attempts to manufacture such a conflict by arguing that:

"Lam was advised to plead guilty by counsel who had already advised a co-defendant to plead guilty, and who believed that that co-defendant's guilty plea would not be accepted by the United States Attorney, or by the Court, unless Lam also pled guilty Having concluded that it was in Szeto's best interests to plead guilty, Gerber believed that he could only serve Szeto's interests if Lam, as well, changed his plea to guilty." (Br. 13).

This argument, however, cavalierly assumes the existence of the very conflict it is claimed to demonstrate, and

is premised upon facts for which there is no support in the record and which the District Court explicitly rejected in its findings. Specifically, petitioner argues that Gerber's advice to Lam that he plead guilty (1) was motivated, in part, by Gerber's desire to serve Szeto's interests to the detriment of Lam's interests, and (2) was part of a "package plea bargain," resulting from his belief concerning the plea policy of the court and Government. (Br. 17).

With respect to Lam's claim that Gerber advised Lam to plead guilty in order to serve Szeto's interests, the District Court unequivocally rejected this claim and its decision is amply supported by the record.* The Court explicitly found that Gerber "never advised Lam to plead guilty so that Szeto would benefit thereby." (A. 10).

The Court based its conclusion upon a number of factors including: (1) Gerber's testimony that he did not so advise Lam at any time, (A. 10); (2) the unlikelihood that Gerber would have thus advised Lam in light of his past efforts in his behalf and his experience as a criminal lawyer generally (A. 8); and (3) the absurdity of Lam's testimony that he pled guilty and risked a substantial term of imprisonment in order to insure that Szeto did not receive a more severe sentence. (A. 9).**

* Review of the District Court's findings of fact is, of course, governed by the "clearly erroneous" standard of Fed. R. Civ. P. 52(a), made applicable to this proceeding by Fed. R. Civ. P. 81(a)(2). See *United States ex rel. Delle Rose v. LaVallee*, 468 F.2d 1288, 1290 (2d Cir. 1972), *rev'd on other grounds*, 414 U.S. 1014 (1973).

** The Court noted also that in view of his prior record, petitioner was "no stranger to the criminal justice system prior to his plea to this indictment, and was therefore not unaware of his right to the effective assistance of counsel." (A. 8). The Court was also, of course, in a position to assess Lam's credibility generally and not surprisingly, found it wanting.

The Court went on to find that Gerber had provided competent and effective legal assistance to Lam during his representation of him in this case, and had advised him to plead guilty not so that Szeto would benefit thereby,* but so advised him:

"... only after he was himself convinced of the petitioner's guilt after having conducted a careful examination and concluding that the petitioner was himself a drug user and had been involved in the crime alleged." (A. 8).

Gerber's advice to Lam was thus in no way tinged by any intention to serve Szeto's interests to the detriment of Lam, for as Gerber summarized it:

"I never recommended to one to plead guilty in order to help the other. They were two separate situations in my contemplation." (Tr. 85).

Lam's invitation to this Court to rewrite the District Court's findings must therefore be politely declined for it is settled that:

"On appeal, we will not disturb findings of fact, determined after a hearing on a motion made pursuant to 28 U.S.C. § 2255 unless those findings are clearly erroneous. [citation omitted] This standard of review is particularly appropriate in this case for an evaluation of the credibility of the

* It bears mention that at no time prior to, during or since the hearing has Lam offered any suggestion or explanation as to why Gerber, who had never counseled Lam to plead guilty before but rather had successfully and ably defended him in two prior criminal cases, would suddenly sacrifice Lam's interests entirely by advising him to plead guilty in an effort to serve those of a total stranger brought to Gerber by Lam.

witnesses who testified before the district judge was of fundamental importance in the resolution of conflicting testimony."

United States v. Pfingst, 490 F.2d 262, 273 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974); *Zovluck v. United States*, 448 F.2d 339, 341 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972). See Rule 52(a), Fed. R. Civ. P.

Lam's second argument is that Gerber's advice to Lam to plead guilty was part of a "package plea bargain" * prompted by his belief that the Government and "the Court would only accept a guilty plea from Szeto if Lam also pled guilty." (Br. 19). This claim is based upon a total misreading of the record and should be rejected.

It must be recalled that on the morning of May 31, 1973, despite his prior decision to plead guilty (Tr. 73-75, 87-89), Lam decided to go to trial. That no "plea bargain package" was contemplated by Gerber is made clear by the fact that upon commencing that morning, Gerber informed the Court that Szeto was prepared to plead guilty to Counts Three and Eight of the indictment but that Lam would not, and therefore would stand trial alone.

* In a gross distortion of the record, counsel states that "According to Gerber's view, his advice to Lam was part of a 'package plea bargain' under which Szeto was allowed to plead guilty only because Lam—in Gerber's words—'accepted the inevitability and advisability of pleading guilty.'" (Br. 16).

Aside from the fact that Gerber was describing Lam's decision to plead guilty *prior* to May 31, 1973, he at no point stated or in any way implied that his advice to Lam was part of a package plea bargain. On the contrary, he categorically denied that such was the case. (Tr. 85).

Mr. Gerber: . . . However, when it comes to Man Chung Lam, on the seventh count, that's the one that Mr. Walton would go along with on the plea, and there the allegations or the proof is going to be, if I am not betraying what he told me, that somebody saw him throw it on the floor. *He denies having had any and he is out.*

The Court: What about the conspiracy?

Mr. Gerber: They deny the conspiracy.

Mr. Walton: If he wants to plead the conspiracy he can do that.

* * * * *

Mr. Gerber: *The conspiracy he denies.*

The Court: *We will have to try him alone.*

Mr. Gerber: *Yes, Your Honor.*

(P.Tr. 4-5) (emphasis added).

If, as Lam suggests, Gerber's actions were motivated by his understanding of the plea policy of the Government in multi-defendant cases,* Gerber would not even have offered to have Szeto plead guilty since he believed that the Court and the Government would not have accepted it. Thus, the fact that Gerber offered to have Szeto plead guilty despite his knowledge that, as he explained to the Court, Lam would not plead guilty, both refutes Lam's claim that Gerber was motivated by his understanding

* It was stipulated that if called Robert Walton, the Assistant United States Attorney in charge of the case, would testify that "it was not the policy of the United States Attorney's Office to require as a condition of accepting a guilty plea from any individual charged with a federal offense that any other individual or co-defendant also plead guilty at that time or at any other time."

to coerce Lam to plead guilty, and shows that this "understanding" had no bearing on this case.

Even more devastating to Lam's "package plea bargain" claim is the fact that the Court then proceeded to hear Szeto's plea, with the Government's approval, in spite of Lam's intention to go to trial alone. Thus, regardless of Gerber's generalized understanding, it was clear at that time that both Lam and Gerber knew the Court and the Government would accept a plea from but one defendant in a multi-defendant case, and that Lam could go to trial alone, since they actually saw that commence. Gerber would therefore have had no reason, in spite of his general understanding, to pressure Lam into pleading guilty to serve Szeto's interests, as petitioner argues. As the record reflects, of course, Szeto failed to admit an intent to sell the heroin, and the trial of him and Lam commenced.

It thus cannot be seriously contended that Gerber was acting pursuant to a mistaken understanding of the plea bargaining practices of the prosecutor or the Court or that a "package plea bargain" was contemplated.* The District Court reached the same conclusion, noting:

"The most logical inference from the fact that Szeto had failed to plead guilty and Mr. Gerber's

* In *United States v. Truglio*, 493 F.2d 574 (4th Cir. 1974), upon which petitioner so heavily relies, one attorney representing all five defendants entered into a plea agreement with the prosecutor during trial. When one defendant indicated some hesitancy in pleading, the Assistant United States Attorney stated in open court that unless all defendants pleaded as agreed, the Government would not accept a plea from any of them and would continue with the trial. 493 F.2d at 577. Truglio thereupon pleaded guilty but sought to withdraw his plea the following day. Any similarity between that case and the instant one is thus purely imagined.

belief as to the practice of the United States Attorney would be that Mr. Gerber would have no motivation to induce a plea from Mr. Lam since he believed that it would not have been agreed to anyway." (A. 9).*

* Lam claims this inference to be "clearly erroneous". That petitioner has overlooked the foregoing and thus seriously misread the record in arguing that "Gerber believed that the Court would only accept a guilty plea from Szeto if Lam also pled guilty" (Br. 19) becomes apparent when one examines the basis upon which his claim is founded.

At the hearing before Judge Werker, Lam's counsel, after recognizing that Lam had intended to plead guilty prior to May 31, 1973, simply assume the existence of a "package plea bargain" and questioned Gerber as though one existed. Thus, he twice asked him "After the Court refused to accept Mr. Szeto's plea, did you attempt to plead Mr. Lam at that time?" (Tr. 89). Failing to get the desired answer either time, since the record shows clearly that Lam intended to go to trial at that point, as Gerber already told the Court, counsel then asked:

Q. Is the reason that before the United States Attorney opened to the jury that you did not attempt to enter a plea of guilty for Mr. Lam is that it was your understanding the U.S. Attorney would not allow one defendant to plead guilty and the other defendant was going on trial? (Tr. 90).

Mr. Gerber answered that that had in fact been his experience generally, but at no time acknowledged that there was any such "arrangement" in this case. Despite the fact that the record is quite clear that no plea by Lam was offered because, as Gerber had already explained to the Court, Lam was going to trial (P. Tr. 4-5), Lam persisted in asking Gerber whether he failed to have Lam plead because of a belief that the Court would not have accepted it. (Tr. 90-93). Recognizing that Gerber's understanding had had no bearing on the case, and that no plea was offered because Lam simply didn't intend to plead at that time, the Court finally admonished Lam's present counsel:

"We are flying in the realm of speculation, imagination. Let's get down to brass tacks, should we?" (Tr. 93).

It is from this highly misleading inquiry that counsel now fashions his entire claim on appeal.

If in fact Gerber's understanding had had any bearing upon his advice to Lam that he plead guilty, one would have expected that: (1) he would not have offered to have Szeto plead guilty, having stated to the Court that Lam would not plead, and (2) once Szeto's attempt to plead failed, he would have had no reason to coerce Lam to plead since such an offer would have been unacceptable in any event, as the District Court concluded.

It is thus apparent that Gerber's advice to Lam to plead guilty was neither (1) the product of his desire to serve Szeto's interests, nor (2) part of a "package deal" resulting from Gerber's understanding of plea practices. In urging this Court to rewrite the District Court's findings of fact, petitioner does not even approach the showing required under *McMann v. Richardson*, 397 U.S. 759 (1970) or *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), and accordingly, his claims should be rejected.

* * * * *

In sum, while it is clear that joint representation of defendants is to be discouraged, and that "the lack of a satisfactory judicial inquiry shifts the burden of proof on the question of prejudice to the Government," *United States v. Carrigan*, *supra*, slip op. at 393; *United States v. DeBerry*, *supra*, 487 F.2d at 453 n.6, in this case there has been an extensive "judicial inquiry," and that inquiry has conclusively demonstrated that Lam was not prejudiced by the joint representation of himself and his co-defendant. Lam's efforts to convince this Court to the contrary are simply a blatant attempt to rewrite the District Court's careful findings of fact. Since those findings were fully supported—indeed compelled—by the record, his claim should be rejected.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JERRY L. SIEGEL, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

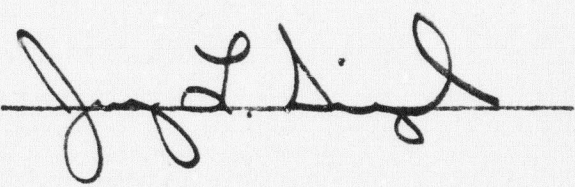
That on the 23rd day of December, 1976,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

Richard Zuckerman, Esq.
Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Ave.
New York, New York

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
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Sworn to before me this

23rd day of December, 1976


MARY L. AVENT
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Qualified in Bronx County
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